77-43

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RAY MELVIN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Ray Melvin, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to reverse its decision affirming the judgment of the United States District Court for the Eastern District of Kentucky.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported, but is appended hereto.

JURISDICTIONAL STATEMENT

The opinion delivered by the United States Court of Appeals for the Sixth Circuit was entered on February 22, 1977 in *United States* v. *Ray Melvin*, No. 76-2192 and No. 76-2341, and is appended to this petition as appendix "a". The final judgment of conviction in the United States District Court for the Eastern District of Kentucky was entered on May 17, 1977 in *United States* v. *Ray Melvin*, Criminal Action 76-2.

Also attached as appendix "b" is a copy of the order denying petition for rehearing. A copy of the Stay of Mandate is appended hereto as appendix "c".

This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction of the Court of first instance was under 18 U.S.C. §3231.

QUESTIONS PRESENTED

I. Whether the Court erred in holding that there was a sufficient nexus with interstate commerce to support a conviction under 18 U.S.C. §1951.

II. Whether the Court erred in holding that the District Court properly had jurisdiction over the person of the petitioner.

III. Whether the Court erred in holding that petitioner had not been deprived of his Sixth Amendment rights by the action of the Trial Court in:

(a) Arbitrarily limiting petitioner's character witnesses to three.

(b) Forbidding petitioner from using said character witnesses because of answers elicited by petitioner on cross-examination of government witnesses.

(c) Prohibiting petitioner from inquiring of additional government witnesses as to petitioner's character.

(d) Prohibiting petitioner from cross-examining a key government witness, Herbie Gene Wheeler, on prior inconsistent statements.

(e) Prohibiting petitioner's counsel from interrogating a co-defendant's witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 18 U.S.C. §1951 provides in pertinent part:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do

anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Petitioner is the former sheriff of Johnson County, Kentucky. On July 9, 1975 the Johnson County Grand Jury indicted petitioner on six counts of bribery and extortion. The indictments charged that on six different occasions petitioner extorted money from certain bootleggers who operated in Johnson County by demanding money in return for protection from arrest for violating the Kentucky statutes against selling alcohol in local option territory. Trial was held, but the jury was unable to agree on a verdict. The case was continued for re-trial at a later date.

On February 23, 1976 a federal grand jury sitting at Pikeville, Kentucky, returned an indictment charging petitioner with eleven counts of violating Title 18, Section 1951, United States Code (popularly known as the Hobbs Act).

This indictment charged the commission of the same acts of extortion against the same bootleggers on the same dates as did the state indictments.

Trial was held and the petitioner was found guilty on seven counts of the indictment. On May 17, 1976 appellant was sentenced to four years'

imprisonment and a fine of $7,500 on four counts, imprisonment to run concurrently, and five years' imprisonment and a $10,000 fine on three counts, said sentences and fines to be suspended and petitioner placed on probation for five years to begin on his release from custody.

REASONS FOR GRANTING THE WRIT

The fundamental questions in this case concern whether the required nexus between interstate commerce and the extortion of local bootleggers by a local sheriff is satisfied upon the mere showing that the beer sold by the bootleggers had previously travelled in interstate commerce. An additional question concerns whether the district court had jurisdiction over the person of the petitioner considering the actions of the state in placing him on trial for the same acts as charged in the federal indictment. Petitioner also questions the actions of the district court in limiting him to three character witnesses and then severely restricting him in the presentation of his case and the cross-examination of government witnesses.

I. THE COURT ERRED IN HOLDING THAT THERE WAS PROVEN A SUFFICIENT NEXUS WITH INTERSTATE COMMERCE TO SUPPORT A CONVICTION UNDER 18 U.S.C. §1951.

Ray Melvin stands convicted of extorting money from Johnson County, Kentucky, bootleggers by allegedly demanding money from them in return for protection from arrest for violating Kentucky's local option law.

Interference with interstate commerce is an essential element of the offense. *Stirone* v. *United States,* 361 U.S. 212 (1960). The only evidence offered by the United States to prove this essential element of the crime was the sale in Kentucky of certain brands of beer manufactured outside Kentucky. The government introduced evidence that the bootleggers sold these brands of beer by purchasing them in a "wet" Kentucky county and transporting them into a "dry" Kentucky county for re-sale. No other evidence was introduced on this element of the offense.

Petitioner asserts this was a failure to prove an essential element of the offense. Logically there must come a point in time when goods travelling in interstate commerce leave the stream of interstate commerce and come to rest. *Robbins* v. *Shelby County Taxing District,* 120 U.S. 497 (1887). Petitioner asserts these goods left the stream of

interstate commerce when they came to rest in the "wet" Kentucky county.

Kentucky Revised Statute 242.260 (hereinafter KRS) makes it "unlawful for any person . . . to bring into, transfer to another, deliver or distribute in any local option territory any alcoholic beverage . . . ."

KRS 244.180 classifies as contraband "Any alcoholic beverages in the possession of anyone not entitled by law to possess them." As contraband the beer sold by these Johnson County bootleggers was not commerce which Congress may regulate under the Commerce Clause of the United States Constitution.

In the case of *Ziffrin* v. *Reeves*, 308 U.S. 132 (1939), this Honorable Court stated:

> The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. . . . Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less . . . The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. *Sligh* v. *Kirkwood*, 237 U.S. 52, 59; *Clason* v. *Indiana*, 306 U.S. 439 (1939).

In *Sligh*, *supra*, the Court found that immature or otherwise diseased oranges had been declared contraband by Florida, and thus were not articles in interstate commerce for the purpose of exportation from Florida. A similar situation involving dead animals existed in *Clason*, *supra*.

In *United States* v. *Pacente*, 503 F.2d 543 (7th Cir. 1974), the Circuit Court of Appeals for the Seventh Circuit upheld the conviction of a policeman who attempted to extort money from a Chicago tavern owner under threat of arrest for violation of the state liquor laws. A major distinction between the facts of *Pacente* and the facts of the case at bar is readily apparent. In *Pacente* a legitimate businessman was being victimized. Such was the case in every other decision petitioner had read concerning the Hobbs Act. In the case at bar local bootleggers are involved. Petitioner submits that extortion of even a bootlegger is a crime, but if so, is a violation of Kentucky, not federal, law. This case is not at all similar to those in which a policeman is extorting money from a business which could legally sell alcoholic beverages.

In *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976), the Sixth Circuit Court of Appeals refused to extend the Hobbs Act to the armed robbery of a department store. The prosecution had proceeded on the theory that since the department store sold articles that had been shipped in interstate commerce, and, moreover, the funds stolen from the store affected the store's ability to purchase more goods shipped in interstate commerce, that sufficient impact upon interstate commerce had been shown to uphold federal jurisdiction. The Court in rejecting the government's position said:

> This interpretation and application of §1951, as urged by the government, would encompass literally any armed robbery occurring in any state. Accordingly, under the de minimus interstate commerce rule, the robbery of a corner grocery store, pharmacy or gasoline station, without more, would be a federal offense. . . . If the time ever comes when the Congress decides to expand federal criminal jurisdiction to include all armed robberies having any effect on interstate commerce, no matter how small, more specific language than the broad general provisions of the Hobbs Act will be necessary.

Petitioner contends that Congress never intended the Hobbs Act to be used in such prosecutions. Bootlegging is a state offense and the

federal government is excluded therefrom by the Twenty-first Amendment. Extortion by a local law enforcement official of a local bootlegger is logically also a state crime.

In *United States* v. *Bass*, 404 U.S. 336, 349 (1971), this Court held that:

> Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

In accord is the later case of *United States* v. *Enmons*, 410 U.S. 396, 411 (1973), in which the Court reiterated that a criminal statute "must be strictly construed, and any ambiguity must be resolved in favor of lenity." This Court also held precisely that neither the language of the Hobbs Act, nor its legislative history, justify the conclusion that Congress intended to work "an unprecedented incursion into the criminal jurisdiction of the States."

This type of prosecution does significantly alter the state-federal criminal jurisdiction relationship. Absent the clear intention of Congress to extend federal jurisdiction into this area, petitioner prays that the question at issue be resolved in favor of traditional state jurisdiction in conformity with the distinctions drawn in *Bass*.

II. THE COURT ERRED IN HOLDING THAT THE DISTRICT COURT PROPERLY HAD JURISDICTION OVER THE PERSON OF THE PETITIONER.

Prior to the federal indictment Ray Melvin had been indicted by the Commonwealth of Kentucky on charges of extortion and bribery. Trial was held in the Johnson Circuit Court which resulted in a "hung jury" on September 18, 1975. It was not until February 23, 1976 that petitioner was indicted by the federal grand jury on charges stemming from the same acts of extortion against the same bootleggers on the same dates as charged in the state indictments.

In the case of *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922), this Court resolved a similar problem on the basis of comity. In that case the Court held that the state had assumed exclusive jurisdiction and that the federal government could obtain jurisdiction only by obtaining a waiver from the state. There has been no waiver by the Commonwealth of Kentucky.

Petitioner further asserts the United States Attorney for the Eastern District of Kentucky violated the policy laid down by the Attorney General on April 6, 1959, commonly known as the "Petite Policy." See *Petite* v. *United States*, 361 U.S. 529 (1960). The "Petite Policy" prohibits a federal trial for the same act or acts as has been previously tried in a state court unless there are compelling federal interests involved, and then only after the prior authorization by the appropriate Assistant Attorney General.

In the case of *Watts* v. *United States*, 422 U.S. 1032 (1975), this Court sanctioned a reversal and dismissed such a charge because the Department of Justice violated the "Petite Policy," See *Ackerson* v. *United States*, 419 U.S. 1099 (1975), and *Hayles* v. *United States*, 419 U.S. 892 (1974).

In the case at bar the state initiated its prosecution first. As there is no compelling federal interest in protecting bootleggers from extortion by a local sheriff, the policy is applicable. Hence, the policy should be applied, and this judgment reversed and remanded with instructions to dismiss.

III. THE COURT ERRED IN HOLDING THAT PETITIONER HAD NOT BEEN DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS BY THE ACTION OF THE TRIAL COURT IN:

(a) Arbitrarily limiting petitioner's character witnesses to three.

(b) Forbidding petitioner from using said character witnesses because of answers elicited by petitioner on cross-examination of government witnesses.

(c) Prohibiting petitioner from inquiring of additional government witnesses as to petitioner's character.

(d) Prohibiting petitioner from cross-examining a key government witness, Herbie Gene Wheeler, on prior inconsistent statements.

(e) Prohibiting petitioner's counsel from interrogating a co-defendant's witnesses.

Petitioner was limited to three character witnesses. Petitioner asserts the trial judge abused his discretion in so limiting the petitioner, and later ruling that petitioner had presented three such witnesses when he questioned three witnesses for the prosecution concerning petitioner's character. The harshness of numerical limitation was recognized in *Peterson* v. *United States*, 268 F.2d 87, 88 (10th Cir. 1959).

It has long been recognized that "a defendant may offer his good character to evidence the improbability of his doing the act charged." 1 Wigmore, Evidence, 3d Ed. §56, p. 450. This Court stated in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), "character is relevant in resolving probabilities of guilt."

Upon attempting to question a fourth government witness about the petitioner's character, the trial judge, in sustaining the government's objection, informed the petitioner that his three character witnesses had been "used up." This was true even though it took the government another two or three days to complete its case.

Petitioner contends that his character is a vital element in his defense. The government witnesses testified as to his character stating it was good. Good character as Professor Wigmore, *supra*, has so clearly pointed out is evidence of the improbability of committing a crime. A man of good character is not likely to have committed crimes such as charged in the indictment. In a case such as this where even the trial judge was willing to admit that the nature of the crime placed the petitioner's character in issue it was error for the Court to arbitrarily limit petitioner to three character witnesses, and then rule they had been "used up" after three government witnesses had been asked about petitioner's character.

Petitioner would agree that ordinarily the Court may in the exercise of its discretion limit the number of witnesses permitted to testify concerning character, but contends that under the facts and circumstances surrounding the case at bar such limitation as imposed here constitutes abuse of discretion in such a degree as to have deprived petitioner of a fair trial.

Petitioner was prohibited from cross-examining a chief government witness concerning prior contradictory statements on the ground that petitioner's counsel had acted as counsel for the witness in state proceedings. Such was not the case, but the trial judge refused to permit the cross-examination on the ground it violated the attorney-client privilege. There was no attorney-client relationship between the petitioner's counsel and the witness, and even if there had been there would have been no privilege because a third-party not connected in any manner with the state proceedings was present thus destroying the confidentiality.

In *Alford* v. *United States*, 282 U.S. 687 (1931), the Court stated:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .

In *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966), this Court re-affirmed *Alford* by stating, "[A] denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

It is a fundamental rule ". . . that a witness may be severely cross-examined in an effort to determine whether he is telling the truth." *United States* v. *Sweeney*, 262 F. 2d 272, 276 (3rd Cir. 1959). "'Great latitude in cross-examination should be allowed." *Fisher* v. *United States*, 231 F. 2d 99, 105 (9th Cir. 1956). The defendant in a criminal case is ". . . entitled to full and complete cross-examination of the government's witnesses . . . ." *Gardner* v. *United States*, 283 F. 2d 580 (10th Cir. 1960).

By refusing to permit the petitioner to cross-examine a key government witness against him

concerning prior inconsistent statements, the trial court deprived petitioner of a fair trial. The limitation placed upon cross-examination deprived petitioner of the latitude spoken of by this Court in *Alford, supra.* Petitioner was unable to ". . . place the witness in his proper setting and put the weight of his testimony and his credibility to a test . . . ." Such limitation was a substantial burden on petitioner's ability to defend himself and should constitute reversible error.

Petitioner also contends it was error to refuse petitioner the right to question a co-defendant's witnesses upon the ground that petitioner had already announced closed. Petitioner elected to close his case because of the Court's ruling concerning the use of character witnesses. Petitioner felt then and asserts now it was error on the part of the trial court to limit him to three character witnesses. The Court's ruling effectively forced petitioner's witnesses from the stand as did the Judge in *Webb* v. *Texas,* 409 U.S. 95 (1972). Taken all together this was a deprivation of a fair trial and due process which left petitioner in the position of being unable to present any defense at all.

In refusing to permit the petitioner to call his own character witnesses, in refusing to permit petitioner to cross-examine a chief government witness on prior inconsistent statements, and in depriving petitioner of the right to examine the

witnesses of a co-defendant, the trial court deprived petitioner of his "right to present a defense." The Sixth Amendment guarantees to the accused the right to be "confronted" with opposing witnesses and to the "Assistance of Counsel." *Herring* v. *New York,* 422 U.S. 853, 857 (1975). This Court went on to state:

> The decisions of this Court have not given to these constitutional provisions a narrowing literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.

The right to present evidence is fundamentally guaranteed an accused person by the Sixth Amendment. *Washington* v. *Texas,* 338 U.S. 14 (1967). The rulings of the trial court in essence prevented petitioner from presenting evidence in his own behalf and deprived petitioner of assistance of counsel. As a result petitioner was deprived of a fair trial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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(606) 437-6218

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to U.S. Sup. Ct. Rule 33(3), I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari were this day mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and also to the Hon. Eldon Webb, United States Attorney for the Eastern District of Kentucky, P.O. Box 1490, Lexington, Ky. 40501, Attorney for Respondent, this 5th day of July, 1977.

Dan Jack Combs

DAN JACK COMBS
Attorney for Petitioner

APPENDIX

APPENDIX A

No. 76-2192
No. 76-2341

Filed
Feb 22 1977
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

RAY MELVIN,)

Defendant-Appellent.)

ORDER

Before PHILLIPS, Chief Judge and WEICK and EDWARDS, Circuit Judges.

Melvin first was indicted in State court. His State court trial resulted in a hung jury and has not yet been retried. Subsequent to the State court trial, Melvin was indicted under the Hobbs Act and found guilty by a jury in District Court of selling protection tc selected bootleggers in exchange for

monthly fees, and of raiding and closing down bootleggers who refused to pay for protection.

Specifically, the jury found Melvin not guilty on the first four counts of the indictment and guilty on counts five through eleven. Melvin was sentenced to four years imprisonment and a $7,500 fine on each of counts five through eight, the imprisonment to run concurrently. He was sentenced to five years' imprisonment and a $10,000 fine on each of counts nine through eleven, said sentences and fines to be suspended and Melvin placed on probation for five years, to begin upon his release from custody.

Melvin presents the following grounds for reversal: (1) There was not sufficient nexus with interstate commerce to support a conviction under 18 U.S.C. § 1951; (2) the trial court lacked both subject matter and personal jurisdiction; (3) prosecution of this action subjected appellant to double jeopardy in violation of the fifth amendment to the United States Constitution; (4) the action should have been dismissed on the basis of comity; (5) the recordings of conversations electronically intercepted and reproduced should have been suppressed at trial; and (6) limitations placed upon appellant's questioning prosecution witnesses regarding his character violated his constitutional right to a fair trial.

Upon consideration, the court concludes that all of these assignments of error are without merit.

Accordingly, it is ORDERED that the judgment of conviction be and hereby is affirmed.

Entered by order of the court.

/s/ John P. Hehman
CLERK

* * * * * * *

APPENDIX B

FILED
MAY 20 1977
JOHN P. HEHMAN, Clerk
Nos. 76-2192 & 76-2341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
RAY MELVIN,)
Defendant-Appellant.)

ORDER DENYING PETITION
FOR REHEARING

Before PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition has been assigned to the hearing panel.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

* * * * * * *

APPENDIX C

FILED
JUN 7 1977
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 76-2192 & 76-2341

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAY MELVIN,
Defendant-Appellant.

BEFORE: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
John P. Hehman, Clerk

* * * * * * *

No. 77-43

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-43

RAY MELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1977. A petition for rehearing was denied on May 20, 1977. The petition for a writ of certiorari was not filed until July 7, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extortion by a county sheriff of individuals who bootleg liquor produced out of state "affects commerce" within the meaning of the Hobbs Act, 18 U.S.C. 1951.

2. Whether petitioner's federal prosecution, which followed a mistrial in state court for the same acts, violated the Department of Justice's policy regarding dual prosecutions.

3. Whether the district court erred in refusing to permit petitioner's counsel, who had formerly represented a government witness, to cross-examine the witness concerning statements that the district court found to be protected by the attorney-client privilege.

4. Whether the district court abused its discretion in limiting the number of character witnesses petitioner could present and in preventing petitioner's counsel from examining a witness after petitioner had rested.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of seven counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was fined $7,500 and sentenced to four years' imprisonment on each of four counts, the sentences to run concurrently; he was sentenced to five years' imprisonment and fined $10,000 on each of the remaining three counts, the fines and sentences to be suspended. He was also placed on probation for five years to begin upon his release from custody (Pet. App. 2a). The court of appeals affirmed (Pet. App. 1a-3a).

The evidence showed that petitioner, a former county sheriff, extorted money from bootleggers in exchange for not enforcing local liquor laws. Bootleggers who refused to pay were raided and closed by police (Pet. App. 1a-2a). Evidence was also introduced to prove that the bootleggers sold beer that had been packaged and brewed out of state (Tr. 29; see Pet. 7).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that extortion of individuals who bootleg liquor produced out of state does not "affect commerce" within the meaning of the Hobbs Act (18 U.S.C. 1951), which in pertinent part provides sanctions against any person who "in any way or degree * * * affects commerce or the movement of any * * * commodity in commerce, by * * * extortion * * *." In enacting the Hobbs Act, Congress intended to utilize its constitutional power to regulate commerce to the fullest possible extent. *Stirone* v. *United States,* 361 U.S. 212, 215. The purpose of the Act parallels the central design of the Commerce Clause and, in so doing, proscribes extortion that "in any way or degree obstructs, delays or affects commerce." *United States* v. *Staszcuk,* 517 F. 2d 53, 58 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 837. The statute thus grants federal jurisdiction in all situations where commerce is affected, even where the effect may be minimal. *United States* v. *Amato,* 495 F. 2d 545 (C.A. 5); *United States* v. *Gill,* 490 F. 2d 233 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *Tropiano,* 418 F. 2d 1069 (C.A. 2), certiorari denied *sub nom. Grasso* v. *United States,* 397 U.S. 1021; *Carbo* v. *United States,* 314 F. 2d 718, 732 (C.A. 9), certiorari denied, 377 U.S. 953. See also *United States* v. *Spagnolo,* 546 F. 2d 1117 (C.A. 4), petitions for a writ of certiorari pending (see Nos. 76-6221 and 76-1194).

Under that standard, petitioner's conduct plainly affected commerce and thus came within the proscription of the Hobbs Act. As the district court noted (Tr. 757), the volume of beer produced out of state that was handled by the bootleggers had a value of "several thousand dollars a week. * * * [T]he fact that [the] imported beer

was handled by the bootleggers and the fact that the protection alleged to have been purchased from [petitioner] protected that activity and that it had a substantial dollar value is an affect on interstate commerce."

There is no support for petitioner's suggestion (Pet. 8-9) that the Hobbs Act does not apply because the individuals from whom petitioner extorted money were engaged in activity that was illegal.[1] The record in this case supports a finding that petitioner's extortion, and his consequent failure to enforce local liquor laws, affected each week the movement in "commerce"[2] of hundreds of cases of beer produced out of state.[3] That is sufficient to bring petitioner's activity within the Hobbs Act.[4]

---

[1]The Court recently refused review in an analogous case, *United States* v. *Grigson*, C.A. 6, certiorari denied, May 23, 1977 (No. 76-1141), in which a local law enforcement officer was convicted under the Hobbs Act for extorting money from truck owners whose trucks were illegally overweight, in return for failing to enforce the weight limitations. As here, the fact that the truck owners were paying for the "protection" of activity that was illegal did not nullify the effect the extortion had on commerce or otherwise remove the extortion from the reach of the statute.

[2]"Commerce" as it is defined in the statute (18 U.S.C. 1951 (b)(3)) includes "all commerce between any point in a State * * * and any point outside thereof * * *." The evidence in this case showed that beer from out of state came into a "wet" county in Kentucky and from there was brought by the bootleggers into a "dry" county (see, *e.g.*, Tr. 36-37, 320).

[3]The district court correctly instructed the jury (Tr. 845-846):

> * * * I would tell you that if you believe from the evidence * * * that beer which was manufactured in a state other than * * * Kentucky came into Kentucky and in the normal course of commerce ended up in the hands of * * * alleged * * * bootleggers * * * and this business, whether legal or illegal * * *, was permitted to continue only upon the condition that * * * the bootleggers * * * pay to the [petitioner] * * * money, then you may find that there is a requisite affect on interstate commerce and there need not be any more.

[4]Petitioner does not raise, and there is accordingly no need for this Court to consider here, the issue whether an illegal activity must constitute "racketeering" to fall within the Hobbs Act. See

2. Petitioner's claim (Pet. 12) that the Department of Justice violated its policy against dual prosecution is incorrect. We believe petitioner would not be entitled to judicial relief on this ground even were there an accurate factual predicate for his claim, but here there is none. The Department informed petitioner's counsel by letter dated November 24, 1976, that petitioner's prosecution had been authorized by the proper officials within the Department in accordance with Department policy (see *Petite* v. *United States*, 361 U.S. 529).[5] (A copy of the letter to petitioner's counsel is set forth in an Appendix to this brief.)

3. Petitioner also claims (Pet. 14) that his attorney, Dan Jack Combs, was erroneously limited in cross-examination of a government witness on the ground that Combs had formerly represented the witness. The witness, Herbie Gene Wheeler, testified on direct examination that he had arranged a meeting between petitioner

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United States v. *Yokley*, 542 F. 2d 300 (C.A. 6); *United States* v. *Culbert*, 548 F. 2d 1355 (C.A. 9), petition for a writ of certiorari pending, No. 77-142. In the instant case, the county judge, trial commissioner jailer, and sheriff (petitioner) were all involved in a scheme to extort protection money from bootleggers over a period of six months (Tr. 58-80). Hence, however "racketeering" is defined, it would appear to include petitioner's activity. Significantly, the Sixth Circuit, which first held that the Hobbs Act only applied to "racketeering activity" (*United States* v. *Yokley*, *supra*), did not mention the issue in affirming petitioner's conviction here.

[5]In petitioner's case, several factors warranted federal prosecution. Petitioner's state trial had ended in a hung jury, and thus there was no danger of double punishment for the same offense. (Nor could double jeopardy even have barred a second trial by the State.) Both petitioner and his co-defendant were prominent local officials in a small county, which made local prosecution difficult. Finally, federal agents reported that there had been attempts to bribe government witnesses to prevent them from testifying.

and several bootleggers at Wheeler's garage, at which the extortion scheme was proposed (Tr. 54-58). Thereafter, Wheeler acted as middleman, collecting money from the bootleggers and delivering it to petitioner (Tr. 56).

During cross-examination of Wheeler, Combs attempted to question him concerning statements Wheeler had made to Combs in a conversation several months earlier (Tr. 201). At a side bar conference the prosecutor informed the court that Wheeler believed that the conversation was confidential and protected by the attorney-client privilege because at the time Combs had been his attorney (Tr. 201-202). The court then excused the jury and conducted a hearing to determine the validity of the claimed privilege (Tr. 202).

The facts adduced at the hearing showed that Wheeler, a bootlegger, and three other bootleggers had met with Combs in the Johnson County Law Library in July or August 1975 (Tr. 201). At the time, all of the bootleggers were under indictment in state court for bribery. (Petitioner, who also was represented by Combs, had also been indicted in state court on charges of extortion.) Apparently to insure the confidentiality of the conversation, Combs solicited one dollar from each of the bootleggers (Tr. 202, 210). Wheeler testified that Combs told him, "When we go to trial, I'll do everything I can for you just the same as I would [for] Sheriff Ray Melvin" (Tr. 205). Even though Wheeler was already represented by other counsel and knew that Combs represented petitioner (Tr. 209), Wheeler testified that, as a result of his conversation with Combs and the exchange of money, he believed Combs would represent him in court (Tr. 202, 209, 213). Wheeler said he discussed his case with Combs only because he thought Combs would be his lawyer and that the information would be confidential (Tr. 213).

Based upon the hearing, the district court held that the conversation was protected by the attorney-client privilege and limited cross-examination accordingly (Tr. 212).[6] Contrary to petitioner's contention (Pet. 16), the record as summarized above amply supports the district court's findings that Combs and Wheeler had an attorney-client relationship at the time of the conversation and thus that the conversation was inadmissible at trial.

There is also nothing to petitioner's claim (Pet. 17-18) that the limitation on cross-examination deprived him of a fair trial. While he does not phrase it as such, petitioner's claim in essence appears to be that Combs' prior relationship with Wheeler resulted in a conflict of interest that denied petitioner effective assistance of counsel. See *United States* v. *Jeffers*, 520 F. 2d 1256 (C.A. 7), certiorari denied, 423 U.S. 1066. But any other counsel who represented petitioner also would have been prohibited from cross-examining Wheeler concerning statements the witness had made to his attorney. Wheeler's refusal to waive the privilege simply resulted in Combs' being in no better position to cross-examine Wheeler than any other lawyer would have been (*United States* v. *Jeffers, supra*, 520 F. 2d at 1265; *United States* v. *Alberti*, 470 F. 2d 878, 881 (C.A. 2), certiorari denied, 411 U.S. 919).

Moreover, aside from the limitation on cross-examination, Combs' former representation of Wheeler did not hamper his representation of petitioner. Combs cross-

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[6]With Wheeler's knowledge, Combs had recorded their conversation at the law library (Tr. 207). The district court refused to admit the tape into evidence, but did ask that the tape be made a part of the record (Tr. 211). This never occurred. A transcript of the tape has been prepared in connection with disciplinary proceedings against Combs as a result of this incident; a copy of the transcript is being lodged with the Clerk of the Court.

examined Wheeler extensively (Tr. 214-226) and otherwise defended petitioner vigorously. The fact that an attorney may not pursue one line of questioning does not mean that petitioner was deprived of effective representation. See *United States* v. *Jeffers, supra,* 520 F. 2d at 1265.

In any event, there is no reasonable likelihood that Wheeler's impeachment could have affected the jury verdict.[7] Wheeler's testimony concerning the meeting with petitioner at Wheeler's garage was corroborated by several other witnesses who had attended the meeting (*e.g.,* Tr. 283-288, 297-302, 322-325, 338-339, 422-425). Two other witnesses also testified that they paid protection money to petitioner, and the government introduced tape recordings of the transaction to corroborate their testimony (Tr. 428, 431-434, 542-545, 559-563, 566-569, 572-575, 577, 592-595, 599-601, 604-606, 611). Thus, even if Wheeler had never testified, the evidence of petitioner's guilt would have been convincing.

4. Petitioner raises (Pet. 14) other alleged trial errors, none of which warrants further examination by this Court. He contends that the trial court arbitrarily limited the defense to three character witnesses and that defense counsel was prevented from cross-examining other witnesses about petitioner's character. Such determinations were, however, within the discretion of the trial judge

[7]It is unlikely that Wheeler could have been effectively impeached on the basis of the taped conversation. At the time of the conversation, Wheeler himself was under indictment in state court, and he denied all wrongdoing. But he subsequently was given immunity from prosecution and at trial admitted the apparent discrepancy in his testimony (Tr. 220, 223; see Tr. 246-247). Introducing the tape of his conversation would not have added significantly to the evidence regarding Wheeler's credibility that was already before the jury.

to make. See Rule 403, Fed. R. Evid.; *Hamling* v. *United States,* 418 U.S. 87, 127.[8] Petitioner also objects that he was not allowed to cross-examine a witness called by his co-defendant. This occurred when petitioner's counsel, who had already rested his case, attempted on cross-examination to go beyond the scope of direction examination and, in effect, make the witness his own. This the trial court properly refused to permit (Tr. 779-780).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

SEPTEMBER 1977.

[8]After being instructed by the trial court that only three character witnesses could testify for each defendant (Tr. 12), petitioner's counsel nevertheless insisted on using the government's own witnesses to testify to petitioner's character. After much discussion (Tr. 21-24), the trial court permitted this line of questioning—even though the issue had not been raised by the government during direct examination—as if the witness had been called by petitioner (Tr. 317-318; see Rule 611(b), Fed. R. Evid.). After similarly questioning two other witnesses (Tr. 279-280, 292-294), petitioner's counsel was informed that he had used his allotted number of character witnesses (Tr. 304-309). Since the issue of petitioner's reputation was already before the jury, the trial court properly refused to admit cumulative testimony on that issue (see Rule 403, Fed. R. Evid.).

*The Solicitor General is disqualified in this case.

DOJ-1977-09

APPENDIX

November 24, 1976

T.11/4/76
RLT:THH:AJR:plh
186-30-1
Dan Jack Combs, Esq.
Dan Jack Combs, PSC
207 Caroline Avenue
Pikeville, Kentucky 41501

Re: *Ray Melvin, Johnson County Sheriff*

Dear Mr. Combs:

This is in response to your letter of September 15, 1976, wherein you inquired as to whether I or any other Assistant Attorney General approved the institution of a criminal proceeding against Ray Melvin in the Eastern District of Kentucky. As the United States Attorney for the Eastern District of Kentucky indicated to you in his letter of October 18, 1976, the initiation of this criminal prosecution conformed with the guidelines and policies of the Department of Justice.

While the Department of Justice has a policy against successivê state-Federal prosecutions in appropriate cases, the authority to prosecute Ray Melvin was granted in this case based upon its specific facts and circumstances.

Sincerely,

RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division

cc:Records
Section Chron
Reich (2)
Thornburgh